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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ERNEST O. ABBIT, on behalf of
himself and on behalf of all persons
similarly situated,

Plaintiff,

v.

ING USA ANNUITY AND LIFE
INSURANCE COMPANY, et al.

Defendants.

CASE NO. 13cv2310-GPC-WVG

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
CLASS CERTIFICATION,
APPOINTMENT OF
REPRESENTATIVE AND
APPOINTMENT OF CLASS
COUNSEL**

[ECF No. 39]

Plaintiff Ernest O. Abbit brings this action, on behalf of himself and all others similarly situated, alleging that Defendants ING USA Annuity and Life Insurance Company and ING U.S., Inc. (“Defendants” or “ING”) unlawfully target senior citizens by marketing indexed-annuity contracts that purport to protect retirement savings while hiding an undisclosed complex embedded derivative structure. (FAC ¶¶ 3-9, ECF No. 20.) Plaintiff asserts that the design and execution of the derivatives have caused him and putative class members harm.

Presently before the Court is Plaintiff’s Motion for Class Certification, Appointment of Class Representative and Appointment of Class Counsel. (ECF No. 39.) ING opposed Plaintiff’s motion on May 15, 2015. (ECF No. 43.) Plaintiff filed a reply on May 29, 2015. (ECF No. 46.) A hearing was held on June 25, 2015. Having considered the parties’ submissions and oral arguments, as well as the applicable law,

1 the Court **GRANTS in part** and **DENIES in part** Plaintiff's motion.

2 **BACKGROUND**

3 Plaintiff, an 83-year-old retired senior citizen, purchased an "ING (fixed)
4 indexed-annuity with an effective date of September 28, 2010." (FAC ¶ 21.) Plaintiff
5 purchased the annuities through independent financial advisor Matthew Copley. (ECF
6 No. 43-7 at 11:15:20-11:16:57.)

7 An annuity is a contract between an investor and an insurance company in which
8 the investor pays premiums to the insurance company in exchange for the insurance
9 company's promise to return the deposit via periodic payments. (FAC ¶ 26.) Annuity
10 contracts typically undergo two primary periods: the "full accumulation period," during
11 which the investor deposits funds with the insurance company, and the "annuitization
12 period," during which the investor withdraws funds in the form of periodic payments.
13 (FAC ¶ 27.)

14 Fixed index annuities ("FIAs") are annuities that "generally earn interest
15 linked-to, or derivative-of the price movements of, an equity index or other index, such
16 as the S&P 500® Index. Indexed annuities can also guarantee interest." (FAC ¶ 28(c).)
17 The policy parameters (such as "caps," "participation rates" and "spreads") are
18 periodically declared by the insurance company. (FAC ¶ 29.) ING used the term
19 "Secure Index" in their fixed index annuities ("FIAs") to portray their FIAs protective
20 investments that have earnings "linked" to the S&P 500 Index (or similar market index)
21 under brand names "ING Secure Index Opportunities Plus," "ING Secure Index Five,"
22 "ING Secure Index Seven," and ING Secure Index Outlook." (FAC ¶ 4.) ING offers
23 five different index-crediting "strategies" from which indexed-annuity investors may
24 select. (FAC ¶ 61.)

25 Plaintiff maintains that ING produced uniform sales materials for FIAs which
26 promised "protection" of assets and "Index Opportunities" for Plaintiff and members
27 of the Class. (FAC ¶ 6, ECF No. 39-21, 70:2-16.) At his deposition, Plaintiff was
28 asked about the ING USA sales brochure described in his complaint. Plaintiff testified

1 that he did not read or review the brochure in detail prior to purchasing the annuity and
2 did not understand it. (ECF No. 43, Ex. 5 at 54:7–12.) During his deposition, when
3 asked to review the brochure and highlight any false statement by ING, Plaintiff said
4 “[n]o. I would prefer not to.” (*Id.* at 95:22–96:8.) In a post-purchase survey (ECF No.
5 43, Ex. 7), Plaintiff reported that he relied more on independent financial advisor
6 Matthew Copley than on any written materials in deciding to purchase his contract.
7 (ECF No. 43, Ex. 5 at 53:5–11.)

8 Defendant replies that ING USA fixed index annuities are sold by a variety of
9 individuals and organizations, including independent agents, retail broker-dealers,
10 marketing organizations, and banks. (ECF No. 43, Ex. 4 at ¶ 18.) Further, ING
11 contends that the only ING USA materials provided to all purchasers are the
12 application and a disclosure form, and that no ING USA sales material are provided to
13 all prospective purchasers. (ECF No. 43 at 6.)

14 Plaintiff alleges ING embedded derivatives into the retirement savings without
15 disclosing them to Plaintiff and members of the Class. (FAC ¶ 4.) “Embedded
16 derivatives” are described by Plaintiff as exotic financial structures that are complex,
17 opaque, and illiquid market-linked instruments. (FAC ¶ 5.) Plaintiff claims ING
18 exercised its investment discretion under the contracts in a manner that ensured that its
19 FIAs did not protect or build up retirement savings. ING responds that the “embedded
20 derivatives” assertion stems solely from the fact that the annual interest rate may be
21 based on changes in the S&P 500 Index (ECF No. 43 at 2.), and that this information
22 is disclosed in the contract.

23 Plaintiff also alleges ING offered Secure Index Opportunities Plus annuity
24 investors a five percent (5%) bonus which purportedly added to investors’ total
25 premium at contract inception as an immediate head start on earnings. (FAC ¶ 34; FAC
26 Ex. A at 5.) The 5% bonus was not available to investors in “ING Secure Index Five”
27 and “ING Secure Index Seven” annuities. *Id.*

28 On March 27, 2014, Plaintiff filed the operative pleading, a First Amended

1 Complaint, alleging eleven causes of action against Defendant: (1) Breach of Contract
2 (against ING); (2) Breach of the implied covenant of good faith and fair dealing
3 (against ING); (3) Breach of Fiduciary Duty (against ING) and Aiding and Abetting
4 a Breach of Fiduciary Duty (against ING U.S.); (4) Financial Elder Abuse in violation
5 of California Welfare & Institutions Code § 15600, et seq. (against ING); (5) Actual
6 and Constructive Fraud (against ING); (6) Unlawful, Deceptive, and Unfair Business
7 Practices in violation of California Business & Professions Code § 17200, et seq.
8 (against ING); (7) Unfair, Deceptive, and Misleading Advertising in violation of
9 California Business & Professions Code § 17500, et seq.; (against ING); (8) Failure to
10 Supervise (against ING); (9) Declaratory Relief re Qualifying Securities (against ING);
11 (10) violations of the California Securities Act (against ING); and (11) Control Person
12 Liability (against ING U.S.). (ECF No. 20.) On May 1, 2014, Defendants filed an
13 Answer to the First Amended Complaint. (ECF No. 24.)

14 On March 27, 2015, Plaintiffs filed the instant Motion to Certify Class. (ECF No.
15 39). Plaintiff's proposed classes consist of:

16 **The Multi-State Class**

17 All persons or entities that, when a resident of either the state of California,
18 Florida, Illinois, Pennsylvania or Texas, purchased a Secure Index fixed index annuity
19 contract from ING USA Annuity and Life Insurance Company within the applicable
20 statute of limitations.

21 Plaintiff proposes to certify this Multi-State Class for violation of breach of
22 contract relating to ING's alleged failure to maintain the contracts' minimum
23 guaranteed contract values. (ECF No. 39 at 10.)

24 **The California Class**

25 All persons or entities that, when a resident of California, purchased a Secure
26 Index fixed index annuity contract from ING USA Annuity and Life Insurance
27 Company within the applicable statute of limitations.

28 Plaintiff proposes to certify this California Class for:

- 1 (1) Breach of the implied covenant of good faith and fair dealing;
- 2 (2) Breach of Fiduciary Duty;
- 3 (3) Fraudulent concealment;
- 4 (4) Violation of Unfair Competition Law under Cal. Bus. & Prof. Code, § 17200, et seq;
- 5 (5) Violation of False Advertising Law (“FAL”) under Cal. Bus. & Prof. Code § 17500,
- 6 et seq.;
- 7 (6) Declaratory Relief re Qualifying Securities;
- 8 (7) Violations of the California Securities Act under Cal. Corp. Code §25401.
- 9 (ECF No. 39 at 10.)

10 **The California Seniors Subclass**

11 All members of the California Class that were age 65 or older on the date of
12 purchase. (ECF No. 39 at 11.)

13 Plaintiff proposes to certify this California Class for:

- 14 (1) Violation of Financial Elder Abuse Law under Cal. Welf. & Inst. Code § 15600, et
15 seq.

16 **LEGAL STANDARD**

17 “The class action is an exception to the usual rule that litigation is conducted by
18 and on behalf of individual named parties only. In order to justify a departure from that
19 rule, a class representative must be a part of the class and possess the same interest and
20 suffer the same injury as the class members.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.
21 Ct. 2541, 2550 (2011) (internal quotation marks and citations omitted). To fit within
22 the exception, “a party seeking to maintain a class action ‘must affirmatively
23 demonstrate his compliance’ with [Federal Rule of Civil Procedure] 23.” *Comcast*
24 *Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Dukes*, 131 S. Ct. at 2551-52).

25 Rule 23 contains two sets of requirements. First, “Rule 23(a) ensures that the
26 named plaintiffs are appropriate representatives of the class whose claims they wish to
27 litigate. The Rule’s four requirements—numerosity, commonality, typicality, and
28 adequate representation—effectively limit the class claims to those fairly encompassed

1 by the named plaintiff's claims.” *Dukes*, 131 S. Ct. at 2550 (internal quotation marks
2 and citations omitted). Second, “[w]here a putative class satisfies all four requirements
3 of 23(a), it still must meet at least one of the three additional requirements outlined in
4 23(b).” *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv.*
5 *Workers Int’l Union AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir.
6 2010).

7 On a motion for class certification, the Court is required to “examine the merits
8 of the underlying claim . . . only inasmuch as it must determine whether common
9 questions exist; not to determine whether class members could actually prevail on the
10 merits of their claims.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 n.8 (9th
11 Cir. 2011) (citations omitted).

12 DISCUSSION

13 I. Rule 23(a)

14 The Court first examines Plaintiff’s showing on each of the requisite prongs of
15 Federal Rule of Civil Procedure 23, starting with Rule 23(a) requirements of
16 numerosity, commonality, typicality, and adequate representation.

17 A. Numerosity

18 The numerosity requirement is satisfied if “the class is so numerous that joinder
19 of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Here, Plaintiff’s proposed
20 class numbers in the thousands. (ECF No. 39-1 at 11.) Defendants do not dispute this
21 and have not specifically challenged Plaintiff’s motion on numerosity grounds. In this
22 case, joinder of all members clearly would be impracticable. The Court, therefore,
23 finds that Plaintiff’s proposed class meets the numerosity requirement. *See In re Nat’l*
24 *W. Life Ins.*, 268 F.R.D. 652, 660-61 (S.D. Cal. 2010) (finding numerosity requirement
25 clearly satisfied where class encompassed over 16,000 annuity policies).

26 B. Commonality

27 With regard to commonality, Rule 23(a)(2) requires Plaintiff to demonstrate that
28 “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The

1 claims of the proposed class members must be based on a common contention that is
2 “of such a nature that it is capable of classwide resolution—which means that
3 determination of its truth or falsity will resolve an issue that is central to the validity
4 of each one of the claims in one stroke.” *Dukes*, 131 S. Ct. at 2551.

5 Plaintiff asserts that the class members’ claims are based on the common
6 contention “that ING’s product design and execution utilized a hidden derivatives
7 structure to transfer risks to Plaintiff and the Class, causing them to overpay for their
8 Secure Index FIA contracts.” (ECF No. 39-1 at 12.) Plaintiff also claims that ING
9 failed to maintain the FIAs at the minimum guaranteed value as provided in the
10 contracts and required by law. (*Id.* at 14-15.) ING does not challenge Plaintiff’s
11 motion on commonality grounds.

12 In the present case, the following common factual and legal questions exist:

13 (1) whether FIA contract forms were uniform and substantially similar as to the
14 claimed protection of FIAs at guaranteed values, ING’s exclusive investment
15 discretion, and material omission of the embedded derivatives; (2) whether ING
16 embedded its FIAs with complex derivative structures that caused Class members to
17 lose retirement savings; (3) whether ING owed a special and/or fiduciary obligation to
18 senior citizens and retirees who purchased ING FIAs; (4) whether ING targeted retirees
19 and seniors for sale of its FIAs; (5) whether ING abused its investment discretion in
20 making adjustments to the interest crediting strategy factors and parameters which
21 caused Class members to be harmed; (6) whether ING failed to properly report the
22 FIAs actual present values to the Class members; (7) whether ING falsely reported the
23 FIA contract values in periodic statements mailed to Class members; and (8) whether
24 FIAs qualify as securities under California securities law.

25 Here, though the parties dispute the intent, propriety, and effect of the
26 derivatives imbedded in the Secure Index FIA contracts, the parties do not appear to
27 dispute that there are derivatives included in each Secure Index FIA contract.
28 Moreover, the evidence presently before the Court supports Plaintiff’s view that

1 putative class members were not informed of the derivatives structure of their Secure
2 Index FIA contracts at the time they entered into the contracts. As to Plaintiff's
3 contention that this structure resulted in class members overpaying for their contracts,
4 whether this contention is true or false, the formula Dr. McCann devised to value the
5 contracts and assess damages appears to apply equally to all class members. For
6 purposes of commonality, to the extent Plaintiff contends the putative class members
7 overpaid, they did so at the same time, in the same way. The Court, therefore, finds the
8 commonality requirement is satisfied.

9 C. Typicality

10 Under the third Rule 23(a) requirement, the Court must determine whether "the
11 claims or defenses of the representative parties are typical of the claims or defenses of
12 the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards,
13 representative claims are 'typical' if they are reasonably co-extensive with those of
14 absent class members; they need not be substantially identical." *Hanlon v. Chrysler*
15 *Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "The purpose of the typicality requirement
16 is to assure that the interest of the named representative aligns with the interests of the
17 class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation
18 omitted). "The test of typicality is whether other members have the same or similar
19 injury, whether the action is based on conduct which is not unique to the named
20 plaintiffs, and whether other class members have been injured by the same course of
21 conduct." *Id.* (quotation omitted).

22 Defendants contend that Plaintiff's experience was unique because he relied on
23 an independent agent, Mr. Copley, to tell him the relevant characteristics of the annuity
24 and made his decision based on those oral statements (as opposed to basing his
25 decision on brochures or other materials prepared by ING). (ECF No. 43 at 17-18.)

26 Plaintiff responds that the Secure Index FIA contract, which included hidden
27 derivatives and a related hedging structure, was uniform and issued to Plaintiff and
28 each class member, regardless of what agent they used. (ECF No. 39-1 at 12; ECF No.

1 46 at 8.) No agent constructed or executed these FIAs. (ECF No. 46 at 8.) Thus,
2 Plaintiff argues that “Mr. Abbit’s claims are not only typical of the Class claims, they
3 are identical: *every* contract contained the complained-of derivatives that transmitted
4 market risk to the Class; *every* contract was improperly priced, *every* contract was
5 breached; and ING ensured that *every* consumer and *every* agent did not receive any
6 information about the hidden derivatives structure that transmitted market risk.” (*Id.*)

7 Looking again at Plaintiff’s common contention—“that ING’s product design
8 and execution utilized a hidden derivatives structure to transfer risks to Plaintiff and
9 the Class, causing them to overpay for their Secure Index FIA contracts,” (ECF No. 39-
10 1 at 12)—it is apparent that Plaintiff’s alleged injury is typical of the class. The
11 evidence Plaintiff presented in support of his motion supports his assertion that all of
12 the contracts contained the derivative structure (ECF No. 49-4 at 16) and were
13 relatively uniform. (ECF No. 39-19 at 2; FAC ¶¶44, 63-64, and 114-119; FAC, Ex. A.)
14 Moreover, the evidence before the Court at this time shows that Defendants do not
15 specifically inform sales agents of the derivative structure embedded in the annuities
16 and do not require them to understand how the options structure works. During the
17 deposition of Chad Tope, ING’s President of Annuity Distribution, Mr. Tope explained
18 that “[t]here’s not a need for them [sales agents] to understand the options and the
19 derivative market place to understand how our product works . . .” and “there is no
20 need for them [class members] to understand the hedging.” (ECF No. 39-10 at 104:4-
21 19 - 105:1-7.) Thus, it is largely immaterial to the typicality analysis that Plaintiff’s
22 sales agent may have made unique oral statements during the sales process because the
23 evidence at this point suggests that *none* of the sales agents were aware of the
24 derivative structure and thus, none of them would have made material statements on
25 this issue. In regard to the final portion of Plaintiff’s common contention, that all of
26 the class members overpaid, Plaintiff’s overpayment theories are uniform and
27 plausible.

28 For the foregoing reasons, the Court finds that Plaintiff’s claims are typical of

1 the class he seeks to represent.

2 **D. Adequacy**

3 Finally, Rule 23(a)(4) requires the representative parties to fairly and adequately
4 protect the interests of the class. Fed. R. Civ. P. 23(a)(4). “Resolution of two questions
5 determines legal adequacy: (1) do the named plaintiffs and their counsel have any
6 conflicts of interest with other class members and (2) will the named plaintiffs and their
7 counsel prosecute the action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at
8 1020.

9 As an initial matter, Defendants do not object to class counsel, and the Court’s
10 review of the biographical information submitted regarding Hutton Law Group and
11 Taro & Zamoyski, LLP reveals that they are experienced and capable professionals.
12 As such, the Court finds class counsel to be adequate.

13 Plaintiff contends that he is an adequate representative because he is seeking the
14 same remedies, based on the same core of operative facts, as the putative class. (ECF
15 No. 39-1 at 13.) Defendants object to Plaintiff’s adequacy as a class representative,
16 arguing that many of Plaintiff’s claims are moot and that his claim for restitution
17 conflicts with other class members’ objectives. (ECF No. 43 at 13-17.)

18 **1. Mootness of UCL, FAL, Fraud, Elder Abuse, Securities and**
19 **Restitution Claims**

20 ING contends that several of Plaintiff’s claims are moot because Plaintiff Abbit
21 can never receive less than what he paid for his contract. (ECF No. 43 at 13-15.) To
22 the contrary, if Plaintiff surrendered his contract now, he would net a gain. (*Id.* at 15.)
23 Specifically, ING explains that under California’s UCL and FAL, restitution is the only
24 damages model available and restitution must account for any benefits received. (ECF
25 No. 43 at 13.) Because Plaintiff gained more than he lost, his claim is moot. Likewise,
26 ING contends that in order to recover out-of-pocket damages for a fraud claim, Plaintiff
27 must show that he suffered an actual loss. (*Id.*) For his elder abuse claim, ING argues
28 that Mr. Abbit “must show that he lost his property and that ING is wrongfully

1 retaining it.” (*Id.*) Finally, under California securities law, ING asserts that the
2 measure of damages is rescission or the “return of consideration.”¹ (*Id.*) Because all
3 of these causes of action requiring a showing of actual losses and ING contend that
4 Plaintiff has none, ING assert that his claims are moot and that Mr. Abbit, therefore,
5 is an inadequate class representative. (*Id.*)

6 Plaintiff Abbit responds that he has provided unrebutted expert opinion that he,
7 as well as every other member of the California Class, were harmed in that each of
8 them overpaid for their FIA. (ECF No. 46 at 11.) In response to ING’s contention that
9 supervening events must be considered, Plaintiff submits that these events are
10 irrelevant and points out that, as the court held in *In re Nat’l W. Life Ins.*, “[t]he fact that
11 Plaintiffs’ accounts increased in value does not mean that the Plaintiffs would not have
12 received more value absent Defendants[’] alleged reduction in the credited interest
13 rate.” (*Id.* (quoting *In re Nat’l W. Life Ins.*, 268 F.R.D. 652, 666 (S.D. Cal. 2010)).

14 Defendants argue that in determining whether Plaintiff is an adequate
15 representative for claims seeking out-of-pocket losses, the Court should not look just
16 at the value of the asset at the time of the transaction, but also at supervening
17 circumstances. (ECF No. 43 at 14.) Defendants contend that the fact that Plaintiff has
18 earned more money on his contract than other class members, essentially recouping
19 some of his losses, puts him at odds with other class members in terms of the out-of-
20 pocket damages calculation.

21 Recently, the Ninth Circuit held that damages calculations in UCL and FAL
22 actions need not account for benefits received after purchase of the service because the
23 focus is on the value of the service at the time of purchase. *Pulaski & Middleman, LLC*
24 *v. Google, Inc.*, No. 12-16752, 2015 WL 5515617, at *8 (9th Cir. Sept. 21, 2015). The
25 court observed that, instead, in calculating restitution under the UCL and FAL, the
26

27 ¹ ING also notes that they believe Plaintiff’s securities law claim is meritless because
28 California securities law specifically excludes annuity contracts from the definition of a “security.”
(ECF No. 43 at 13 (citing Cal. Corp. Code § 25109 (“‘Security’ does not include . . . any . . . annuity
contract.”))).

1 focus is on the difference between what was paid and what a reasonable consumer
2 would have paid at the time of purchase without the fraudulent or omitted information.
3 *See also Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 329 (2011).

4 Using the economic harm at the time of purchase, Plaintiff's recovery turns on
5 the same calculation as the remainder of the class and Plaintiff is an adequate
6 representative for the proposed classes.

7 2. Mootness of Breach of Contract Claim

8 ING also asserts that Mr. Abbit is an inadequate representative on the breach of
9 contract cause of action because the claim relates to ING's alleged failure to provide
10 for daily compounding of interest in his minimum guaranteed contract value
11 ("MGCV") calculation, and Plaintiff has reached a point where his Cash Surrender
12 Value is certain to be higher than the MGCV even if interest on the MGCV had been
13 compounded daily.² (ECF No. 43 at 15.) Plaintiff did not respond to this argument.
14 The Court finds below that this portion of the claim is not suitable for certification
15 based on predominance. However, Plaintiff's claim of failure to maintain the
16 contracts' minimum guaranteed values is also based on ING setting the prices of the
17 undisclosed derivatives structure so low that the true values of the contracts were
18 below the minimum values guaranteed. ING does not challenge Mr. Abbit's adequacy
19 as a representative as to the undisclosed derivatives structure claim. Accordingly, the
20 Court finds that Plaintiff is an adequate representative on the breach of contract cause
21 of action as to this portion of the claim.

22 II. Rule 23(b)(3)

23 Plaintiff argues that the Court should grant class certification under Rule
24 23(b)(3). Under Rule 23(b)(3), Plaintiff must show that "questions of law or fact
25 common to class members predominate over any questions affecting only individual
26

27 ² Defendant's assertion that Plaintiff's Cash Surrender value is certain to be higher than his
28 MGCV is based on paragraph 4 of the Declaration of William Bainbridge (ECF No. 43-1.) Plaintiff
objects to paragraph 4 as irrelevant, lacking in foundation, impermissible lay opinion, and speculation.
(ECF No. 46-1 at 1.)

1 members, and that a class action is superior to other available methods for fairly and
2 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) lists
3 the following factors as pertinent to a court’s assessment of the predominance and
4 superiority criteria:

5 (A) the class members’ interests in individually controlling the
6 prosecution or defense of separate actions;

7 (B) the extent and nature of any litigation concerning the controversy
8 already begun by or against class members;

9 (C) the desirability or undesirability of concentrating the litigation of the
10 claims in the particular forum; and

11 (D) the likely difficulties in managing a class action.

12 *Id.*

13 **A. Predominance**

14 To satisfy the predominance requirement, “the common questions must be ‘a
15 significant aspect of the case ... [that] can be resolved for all members of the class in
16 a single adjudication.’” *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir.
17 2014) (quoting *Hanlon*, 150 F.3d at 1022). The predominance inquiry requires a court
18 to consider “how a trial on the merits would be conducted if a class were certified. *Bell*
19 *Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (quotation marks and
20 citation omitted). This, in turn, “entails identifying the substantive issues that will
21 control the outcome, assessing which issues will predominate, and then determining
22 whether the issues are common to the class, a process that ultimately prevents the class
23 from degenerating into a series of individual trials.” *Id.* (quotation marks and citation
24 omitted).

25 Here, the predominance inquiry begins with identifying the evidence that
26 supports each of the causes of action identified in the motion; determining the extent
27 of the common factual and legal issues, and determining whether common issues
28 predominate.

1 **1. Multi-State Breach of Contract Cause of Action**

2 With respect to the breach of contract cause of action, Plaintiff seeks certification
3 of a multi-state class as to ING’s failure to maintain the contracts’ minimum guaranteed
4 values. (ECF No. 41 at 14-15.) This breach allegedly occurred as a result of (1) ING
5 failing to calculate and compound interest daily; and (2) ING setting the prices of the
6 undisclosed derivatives structure so low that the true values of the contracts were
7 below the minimum values guaranteed. (*Id.*)

8 ING contends that extrinsic evidence of each class member’s understanding of
9 what the contract intended will be necessary to support Plaintiff’s claim that the
10 contract term providing for “interest credited daily” actually means “interest credited
11 *and compounded* daily.” (ECF No. 43 at 23.) Because this individual inquiry will be
12 necessary, ING argues Plaintiff has failed to demonstrate predominance. (*Id.*)
13 Defendants argue that this is particularly true given that Plaintiff proposes a multi-state
14 class and Plaintiff has failed to establish that “each state’s rules on construction,
15 extrinsic evidence, ambiguity, and *contra proferentum* are uniform, or that those
16 differences can be respected at trial.” (*Id.* at 24.)

17 Plaintiff responds that, even if it were true that evidence of contractual intent and
18 extrinsic evidence were necessary, this would not make the adjudication unmanageable.
19 (ECF No. 46 at 10.) First, Plaintiff believes contractual intent can be determined
20 through common evidence, such as premium payments and contract delivery. (*Id.*)
21 Second, Plaintiff points out that the FIAs are fully integrated and the plain meanings
22 of “interest credited daily” and “minimum guaranteed contract value” are uniform.
23 (*Id.*) Third, Plaintiff states that “any extrinsic evidence to resolve the meaning of the
24 contractual guarantees as related to the hidden ‘embedded derivatives’ is also common
25 to the Class.” (*Id.* (citing ING’s SEC filing)). Finally, Plaintiff submits that there are
26 no meaningful variances between the five states in terms of their rules of construction,
27 so any differences can be managed during the litigation and trial. (*Id.* at 10 and n.22.)
28 Plaintiff provides a chart comparing the different states’ laws on contract interpretation.

1 (ECF No. 46, Ex. G.)

2 ING asserts that “[a] class action should not be certified where extrinsic evidence
3 as to the scope and meaning of contractual duties may be necessary.” (ECF No. 43 at
4 23.) ING relies on *Monaco v. Bear Stearns Co.*, No. CV 09-05438-SJO-JCX, 2012 WL
5 10006987, at *6 (C.D. Cal. Dec. 10, 2012), where the court considered a proposed class
6 of individuals who had undertaken option adjustable rate mortgages. The court
7 determined that certain contract terms were ambiguous and that extrinsic evidence was
8 required to construe them. *Monaco*, 2012 WL 10006987, at *6. Because the three
9 named plaintiffs varied significantly in their understanding of the ambiguous contract
10 terms,³ the court found that common issues did not predominate. *Id.* *Fletcher v. Sec.*
11 *Pac. Nat'l Bank*, 23 Cal. 3d 442, 448-49 (1979), involved a claim that the bank’s
12 practice of calculating “per annum” interest rates on a 360 day year constituted unfair
13 trade practice. The court found that individual issues of each borrower’s knowledge
14 predominated over the common questions of law, because many borrowers were aware
15 of the bank’s policy.

16 In the instant case the parties dispute the meaning of “interest credited daily.”
17 The Court finds that the question cannot be answered with common evidence and
18 requires extrinsic evidence and individualized determinations as to the annuitants’
19 knowledge and understanding of this contract language.

20 Plaintiff also raises a second contract based claim regarding ING setting the
21 prices of the undisclosed derivatives structure so low that the true values of the
22 contracts were below the minimum values guaranteed. (FAC ¶¶ 38, 88-89.) Plaintiff
23 claims that ING did not properly maintain the minimum contractual values, as ING was
24 obliged to do contractually and pursuant to Cal. Ins. Code § 10168.25. ING has not
25

26 ³ “Mr. Monaco believed, based on conversations with his broker, that he was taking on a loan
27 with a 1 % interest rate for “at least one year” and that he was only required to pay interest, and not
28 the principal. Mrs. Monaco believed that the interest rate would vary between 1% and 3% for five
years, based on conversations with her husband. Finally, Brandt has testified that he believed he was
entering into a thirty-year 1% fixed rate loan based on conversations with his broker and a notary.
Monaco, 2012 WL 10006987, at *6 (internal citations omitted).

1 challenged Plaintiff's allegation that the undisclosed derivatives were common to all
2 FIAs and that common evidence exists to determine whether the FIAs value was less
3 than the minimum values guaranteed under the contracts and the law. The factual and
4 legal issues as to this claim appear to be common and amenable to class determination.
5 The Court finds that Plaintiff has sufficiently alleged a breach of contract that is
6 capable of being adjudicated with common evidence and that class certification is
7 appropriate.⁴

8 2. California Class (Statutory Claims)

9 Plaintiff asserts statutory claims for (1) Unlawful, Deceptive and Unfair Business
10 Practices ("UCL") (Cal. Bus. & Prof.Code § 17200, et seq.); (2) Unlawful, Deceptive
11 and Misleading Advertising ("FAL") (Cal. Bus. & Prof.Code § 17500, et seq.); (3)
12 violations of the Elder Abuse statute (Cal. Welf. & Inst.Code § 15610, et seq.), and (4)
13 violations of the California Securities Act (Cal. Corp. Code §25401). (FAC ¶¶ 144-
14 150, 157-172, 190-192.)

15 Plaintiff alleges the common contention that ING's product design and execution
16 utilized a hidden derivatives structure to transfer risks to Plaintiff and the Class,
17 causing them to overpay for their Secure Index FIA contracts. (FAC No. 49 at 12.)
18 According to Plaintiff, this common contention is capable of class-wide resolution
19 through common evidence, including, inter alia, (1) uniform sales materials, (2)
20 uniform training of sales agents, (3) pricing memoranda, (4) ING's interest-crediting
21 decisions driven by meeting corporate objectives, (5) uniform Secure Index FIA
22 contracts, and (6) expert analyses of FIA contract data. *Id.*

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26 ⁴ Plaintiff alleges ING offered Secure Index Opportunities Plus annuity investors a five percent
27 (5%) bonus which purportedly added to investors' total premium at contract inception as an immediate
28 head start on earnings. (FAC ¶ 34; FAC Ex. A at 5.) However, the 5% bonus was not available to
investors in "ING Secure Index Five" and "ING Secure Index Seven" annuities. As such, questions
relating to the bonus are not common to the entire class and are not suitable for class certification. *Cf.*,
Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1067-68 (9th Cir. 2010) ("Class certification is
available only to those members who were actually exposed to the business practices at issue.").

1 **a. Unfair Competition Law**

2 California Business and Professions Code § 17200, et seq. is also known as the
3 Unfair Business Practices Act or Unfair Competition Law. “California’s unfair
4 competition statute prohibits any unfair competition, which means ‘any unlawful,
5 unfair or fraudulent business act or practice.’” *In re Pomona Valley Med. Group, Inc.*,
6 476 F.3d 665, 674 (9th Cir. 2007) (citing Cal. Bus. & Prof. Code §§ 17200, et seq.).
7 “The ‘unlawful’ practices prohibited by . . . section 17200 are any practices forbidden
8 by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or
9 court-made.” *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal. App.
10 4th 861, 881 (1999) (citations omitted). Under the unlawful prong, therefore, the UCL
11 “borrows” violations of other laws and makes them independently actionable under the
12 UCL. In addition, a practice that is not “unlawful” under the UCL may still be
13 considered “unfair.” *See Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.
14 4th 163, 180-81 (1999). To be unfair, the plaintiff must be able to show that his claim
15 is “tethered” to an underlying law. *Cel-Tech*, 20 Cal. 4th at 186-87. Finally, the
16 fraudulent prong of § 17200 requires a showing “that ‘members of the public are likely
17 to be deceived.’ Allegations of actual deception [and] reasonable reliance . . . are
18 unnecessary.” *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d
19 197 (1983).

20 The California Supreme Court has held that “[r]elief under the UCL is available
21 without individualized proof of deception, reliance and injury.” *In re Tobacco II*
22 *Cases*, 46 Cal.4th 298, 320 (2009). The California Court of Appeal noted in
23 *Massachusetts Mutual Life Insurance Co. v. Superior Court*, 97 Cal. App. 4th 1282
24 (2002),

25
26 The fact that a defendant may be able to defeat the showing of causation as to
27 a few individual class members does not transform the common question into a
28 multitude of individual ones; plaintiffs satisfy their burden of showing causation
as to each by showing materiality as to all. Thus, it is sufficient for our present
purposes to hold that if the trial court finds material misrepresentations were
made to the class members, at least an inference of reliance would arise as to the

1 entire class.

2 *Id.* at 1292–93 (internal quotation marks and citations omitted).

3
4 **I. Fraudulent Prong**

5 ING contests predominance under the “fraudulent” prong of the UCL based on
6 the lack of uniform misrepresentations in the marketing or sale of the FIAs. ING points
7 out that oral and written presentations were made to putative class members by
8 independent agents and financial advisors, using their own sales materials. (ECF No.
9 43 at 19-20.) ING assert that “[t]here is no ING USA sales ‘script,’ and the agents and
10 advisors were not required to provide any ING USA materials to prospective purchases
11 other than an application and related disclosure form.” (ECF No. 43 at 19.) Absent a
12 showing that putative class members received “uniform written or oral
13 misrepresentations or omissions,” ING contends that Plaintiff cannot demonstrate that
14 common issues predominate. (*Id.* at 19-20.) ING further asserts that the individualized
15 nature of sales also defeats any claims that ING USA was a fiduciary. (*Id.* at 20.)

16 Plaintiff alleges that ING created uniform sales materials that promised a
17 “guarantee” to “Protect Your Assets” (FAC ¶ 6) and interest potential beyond “other
18 sources of fixed income.” (*Id.*) Mr. Abbit then points out that *all* agents are required
19 to complete training before they sell FIAs and *all* agent-generated sales messaging
20 must be pre-approved by ING. (ECF No. 46 at 2 n.4 (citing Dep. of Chad Tope, ECF
21 No. 39-10 at 53:7-11) and n.6 (citing Dep. of Chad Tope, ECF No. 39-10 at 47:1-9;
22 49:1-11).) Additionally, Mr. Abbit highlights that the agent must attest to ING that
23 they had not made statements that differ from the sales materials, illustrations or
24 proposals that were provided. (ECF No. 46 at 2.)

25 However, there is no evidence that any “uniform materials” other than the
26 contracts were provided to class members. Though the independent agents had to
27 certify that they had not made representations contrary to ING’s written materials, they
28 were not affirmatively required to make any representations about “protection” of

1 retirement assets. This deficiency is not cured by the fact that sales agents were
2 required to attend training, that agent-generated materials were pre-approved by
3 Defendants or that agents attest that they did not make statements that differ from the
4 sales materials. These assertions do not show that the promises that Plaintiff received
5 were made classwide to FIA purchasers. Instead, they only support the conclusion that
6 agents did not make any promises beyond those that were contained in ING materials
7 at any particular time.

8 Other courts have addressed the argument that unique oral representations by
9 sales agents defeat certification in cases based on misrepresentations. The
10 determination in these cases turns on whether the agent relied on uniform sales
11 materials or a uniform sales script. *Compare Avritt v. Reliastar Life Ins. Co.*, 615 F.3d
12 1023, 1035 (8th Cir. 2010) (denying class certification where annuity company “did
13 not adopt a uniform approach with respect to its representation of its interest-crediting
14 policies” and where “annuities were sold by thousands of independent agents who did
15 not follow a particular sales script when working with customers”), and *In re LifeUSA*
16 *Holding Inc.*, 242 F.3d 136, 146-47 (3d Cir. 2001) (denying class certification where
17 there was absence of commonality where independent sales agents did not use sales
18 script in selling annuities, did not rely on uniform sales materials, and were not
19 required to attend training seminar before selling LifeUSA annuities), with *Yokoyama*
20 *v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087 (9th Cir. 2010) (reversing denial of class
21 certification where there was failure to disclose material information in uniformly
22 provided brochures concerning the detriments from annuities which were sold to
23 seniors by independent brokers), *Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D.
24 590, 595 (C.D. Cal. 2012) (denying motion to decertify class where there were
25 misrepresentations as to no sales charges and immediate bonus contained in brochures
26 provided to the consumer), *In re Nat'l W. Life Ins. Deferred Annuities Litig.*, 268
27 F.R.D. at 665 (granting partial class certification where each class member received
28 specific written materials from Defendant which made specific claims regarding a

1 premium bonus and no up-front fees), *and Iorio v. Allianz Life Ins. Co. of N. Am.*, No.
2 05CV633 JLS CAB, 2008 WL 8929013, at *23, *27 (S.D. Cal. July 8, 2008) (denying
3 motion to decertify class and upholding finding that distribution of uniform written
4 communications to each class member “allayed concerns about any differences in the
5 oral communications that the independent selling agents made to class members”).

6 The Court finds a lack of uniformity as to the misrepresentations made to Class
7 members and finds that individualized questions predominate on this theory of
8 recovery. As a result, the Court turns to the other prongs under section 17200 to
9 determine whether class certification is appropriate under the UCL.

10 **ii. Unlawful and Unfair Prong**

11 Plaintiff also relies on the “unlawful” prong of the UCL by alleging violations
12 of the Cal. Ins. Code §§ 332, 780, 781, 827 and 10168.25. (FAC 38, 88-89, 159; ECF
13 No. 39 at 19.).⁵ *See Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1496 (2003)
14 (plaintiffs allege that the defendants acted “unlawfully” by violating Insurance Code
15 §§ 330, et seq.); *see also Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC (JCX),
16 2009 WL 4798873, at *16 (C.D. Cal. Dec. 9, 2009) (violations of Ins. Code § 330, et
17 seq. constitute “unlawful” conduct giving rise to UCL claim). Plaintiff’s theory under
18 the Insurance Code is based on the allegation that ING failed to maintain guaranteed
19 values of the Secure Index FIAs as required by Cal. Ins. Code § 10168.25. Plaintiff
20 intends to prove this claim through the uniform language in the FIAs and the testimony
21 of his expert witness. (ECF No. 39 at 7) ING has not addressed this “unlawful
22 conduct” theory. The Court finds that there are common issues of fact and law as to
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25 ⁵ Cal. Ins. Code § 332 provides “[e]ach party to a contract of insurance shall communicate to
26 the other, in good faith, all facts within his knowledge which are or which he believes to be material
27 to the contract and as to which he makes no warranty, and which the other has not the means of
28 ascertaining.” Cal. Ins. Code §§ 780 and 781 prohibit misrepresentations in the sale of insurance
policies and Cal. Ins. Code § 827 involves the unpermitted sales of securities by an insurer. Cal. Ins.
Code § 10168.25 sets out the approved method for determining minimum nonforfeiture amounts.

1 this claim and that it is suitable for class certification.

2 In addition, “a breach of contract may form the predicate for Section 17200
3 claims, provided it also constitutes conduct that is ‘unlawful, or unfair, or fraudulent.’”
4 *Puentes v. Wells Fargo Home Mortgage, Inc.*, 160 Cal. App. 4th 638, 645 (2008),
5 quoting *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.* 178 F. Supp. 2d 1099,
6 1117, n.12 (2001); see also *Allied Grape Growers v. Bronco Wine Company*, 203 Cal.
7 App. 3d 432 (1988) (buyers’ breach of contract to purchase grapes constituted unfair
8 business practice under Section 17200). To the extent that Plaintiff alleges a breach
9 of contract based upon the same “unlawful” failure to maintain guaranteed values of
10 the FIAs, the alleged breach of contract may also constitute an “unfair” business
11 practice.

12 Based upon the above analysis, the Court finds that common issues predominate
13 as to the “unlawful” and “unfair” business practices claim and Plaintiff’s motion to
14 certify a class based upon a violation of the UCL is GRANTED.

15 **b. False Advertising Law**

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17 Plaintiffs’ false advertising claim is based on Cal. Bus. & Prof. Code § 17500,
18 which “renders it unlawful for a defendant to ‘induce the public to enter into any
19 obligation’ based on a statement that is ‘untrue or misleading, and which is known, or
20 which by the exercise of reasonable care should be known, to be untrue or
21 misleading.’” *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1122 (9th Cir.
22 2009) (citing Cal. Bus. & Prof. Code § 17500). This statement must also be “ma[de]
23 or disseminate[d] . . . in any newspaper or other publication, or any advertising device,
24 or by public outcry or proclamation, or in any other manner or means whatever,
25 including over the Internet.” Cal. Bus. & Prof. Code § 17500.

26 The Court finds insufficient evidence of uniform public dissemination of any
27 untrue or misleading statement. As noted above, Plaintiff has failed to demonstrate that
28 ING brochures were provided to all class members or that class members were

1 subjected to a uniform advertising campaign. As such, Plaintiff has failed to
2 demonstrate that uniform misrepresentations were uniformly disseminated. Plaintiff's
3 motion to certify the California class as to the FAL claim is DENIED.

4 **c. Elder Abuse Law**

5 Plaintiffs allege financial abuse under California's Elder Abuse law, Cal. Welf.
6 & Inst. Code § 15657.5. This law "reflect[s] the Legislature's intent to provide
7 enhanced remedies to encourage private, civil enforcement of laws against elder abuse
8 and neglect." *Intrieri v. Superior Court.*, 117 Cal. App. 4th 72 (2004) (citation
9 omitted). "'Financial abuse' of an elder . . . occurs when a person or entity . . . [t]akes,
10 secretes, appropriates, or retains real or personal property of an elder or dependent
11 adult to a wrongful use or with intent to defraud, or both." Cal. Welf. & Inst. Code
12 § 15610.30(a)(1). Under the statute, it is not necessary that the taker maintain an intent
13 to defraud if it can be shown that the person took the property for a wrongful use and
14 "knew or should have known that [his or her] conduct is likely to be harmful to the
15 elder" *Bonfigli v. Strachan*, 192 Cal. App. 4th 1302, 1315 (2011), *as modified on*
16 *denial of reh'g* (Mar. 24, 2011). *See also* Welf. & Inst. Code § 15610.30(b).

17 The Court has found that class certification is suitable as to claims for unlawful
18 business practices which include allegations that would satisfy the first element of the
19 claim, i.e. ING took money from a subclass of elders. The remaining element for elder
20 abuse requires Plaintiff to establish that money was taken "to a wrongful use." This
21 element focuses on whether ING took the money wrongfully or with the intent to
22 defraud. Plaintiff's theory regarding the failure to maintain guaranteed values of the
23 Secure Index FIAs is based upon common evidence and is common as to all putative
24 class members, thus making class certification appropriate on this claim as well.
25 Therefore, the Court GRANTS the motion to certify the elder abuse class.

26 **d. Securities Laws**

27 Plaintiff also seeks certification of a class based upon violations of the California
28

1 securities laws. Under California law, annuities are exempted from securities laws.
2 Cal. Corp. Code § 25109 (“‘Security’ does not include . . . any . . . annuity contract.”).
3 Notwithstanding California law, Plaintiff argues that FIAs are securities because ING’s
4 internal execution of the “derivatives” and “options” transfers market risks from ING
5 to Plaintiff and the California Subclass. (ECF No. 39 at 21.)

6 As observed by Dr. McCann, FIAs have been regulated by state insurance
7 commissions, rather than by the Securities and Exchange Commission and the NASD.
8 (ECF No. 49-6 at 67.) Plaintiff acknowledges the state of the law but offers a novel
9 theory which would extend the reach of securities law to FIAs. ING has not opposed
10 certification on the security causes of action. Given that common questions of law exist
11 that can be disposed of by motion for summary judgment, the Court GRANTS
12 certification on the security causes of action.

13 3. California Class (Common Law Claims)

14 Plaintiff also seeks class certification as to claims for breach of implied covenant
15 of good faith and fair dealing, breach of fiduciary duty, and fraudulent concealment.
16 (ECF No. 20 ¶¶ 113-143, 151-156, & 173-179.) Plaintiff summarily addresses the
17 merits of class certification as to these three causes of action in less than one page of
18 briefing. (ECF. No. 46 at 18.) The proponent of the class bears the burden of
19 demonstrating that class certification is appropriate. *In re N.D. Cal., Dalkon Shield*
20 *IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir.1982) (citation omitted). “[A]
21 party seeking to maintain a class action ‘must affirmatively demonstrate his
22 compliance’ with [Federal Rule of Civil Procedure] 23.” *Comcast Corp. v. Behrend*,
23 133 S. Ct. 1426, 1432 (2013) (*quoting Dukes*, 131 S. Ct. at 2551-52). The Court finds
24 that Plaintiff has failed to meet his burden of proof of establishing that common issues
25 predominate as to the claims relating to implied covenant of good faith and fair dealing,
26 fiduciary duty, and fraudulent concealment. Plaintiff’s motion to certify class as to
27 these common law causes of action is DENIED.
28

4. Damages

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2 Finally, Defendants argue that Plaintiff has failed to show that damages are
3 measurable on a class-wide basis because each putative class member has experienced
4 individualized gains and credits. (ECF No. 43 at 24.) Additionally, Plaintiff apparently
5 purports to measure each contract's returns against the returns of two specific mutual
6 funds. (*Id.* at 25.) Defendants contend this is inappropriate because Plaintiff testified
7 that he did not want to invest in the stock market and risk a loss. (*Id.*) Defendants
8 argue this disconnect between Plaintiff's damages model and the factual record violates
9 *Comcast.* (*Id.*)

10
11 ING argues that Plaintiff's out-of-pocket damages calculation ignores the
12 individualized gains and credits that each proposed class member has experienced since
13 purchase. (ECF No. 43 at 24.) Those gains allegedly differ based on a variety of
14 factors, including the contract issue date and each individual's interest-crediting
15 strategy selection. (*Id.*) Further, ING submits that Plaintiff's benefit-of-the-bargain
16 calculation is based on an assumption that is contrary to the record. (*Id.* at 25.) Plaintiff
17 responds that Dr. McCann utilizes damages and FIA valuation methodologies that are
18 well-accepted and that both models provide uniform methods of calculating damages
19 for the class. (ECF No. 46 at 6.)

20
21 In *Yokoyama*, the district court, in denying class certification, found that the
22 damages calculation involved highly individualized and fact-specific determinations
23 relating to, among other things, the financial circumstances and objectives of each class
24 member; their ages; the indexed annuity products ("IAP") selected; the performance
25 of the selected index; any changes in the index margin for that particular IAP; any cap
26 on the indexed interest; and the actual rate of return on the IAP. *Yokoyama v. Midland*
27 *Nat. Life Ins. Co.*, 243 F.R.D. 400, 410 (D. Haw. 2007), *rev'd*, 594 F.3d 1087 (9th Cir.
28 2010). The Ninth Circuit reversed the district court observing that damage calculations
alone cannot defeat certification. *Yokoyama*, 594 F.3d at 1094. The Court concluded

1 that there were no individualized issues sufficient to render class certification
2 inappropriate under Rule 23.

3 While the Court entertains concerns as to the methodology of Dr. McCann,⁶ the
4 Court finds at this time that the damage model is plausible and that individualized
5 issues do not defeat certification.

6 **B. Superiority**

7 Rule 23(b)(3) requires that class resolution must be “superior to other available
8 methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P.
9 23(b)(3). “The superiority inquiry under Rule 23(b)(3) requires determination of
10 whether the objectives of the particular class action procedure will be achieved in the
11 particular case.” *Hanlon*, 150 F.3d at 1023 (noting that in some cases, “litigation costs
12 would dwarf potential recovery”) (internal citation omitted). Considerations pertinent
13 to this finding are “(A) the class members’ interests in individually controlling the
14 prosecution or defense of separate actions; (B) the extent and nature of any litigation
15 concerning the controversy already begun by or against class members; (C) the
16 desirability or undesirability of concentrating the litigation of the claims in the
17 particular forum; and (D) the likely difficulties in managing a class action.” Fed. R.
18 Civ. P. 23(b)(3)(A-D).

19 Defendants argue that the “benefit of the bargain” damages Plaintiff and other
20 putative class members would be seeking are high enough that they would have a
21 substantial interest in proceeding independently (even factoring in that Plaintiff’s
22 damages are substantially higher than most class members’). (ECF No. 43 at 10-11.)
23 Defendants argue that this is particularly true given that some of the asserted claims
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25
26 ⁶ While Plaintiff submits that Dr. McCann’s damage models are well-accepted, some courts
27 have expressed reservations about the methodology employed by Dr. McCann in modeling damages
28 in annuity cases. *Yokoyama*, 243 F.R.D. at 410 (finding expert testimony of Dr. McCann plausible
in spite of reservations about the methodology employed in modeling damages); *Negrete*, 238 F.R.D. at
493 (finding that while court had some skepticism that Dr. McCann’s model is supportable, plaintiffs
offered a facially plausible method for showing causation and impact across-the-board).

1 permit an award of attorney's fees, treble damages, and other bases for increasing a
2 compensatory award. (*Id.* at 11.)

3 Plaintiff argues that while the individual damages suffered by each class member
4 are not insignificant, the transaction costs of filing individual claims against a company
5 like ING would far outweigh their recovery. (ECF No. 39-1 at 23; ECF No. 46 at 9
6 (noting that the cost of hiring an FIA advisor alone could surpass the recoverable
7 amounts).)

8 There are no other actions relating to the present issues pending. The current
9 action is being led by a litigant who has a large stake in the litigation and is motivated
10 to adequately represent the interests of putative class members. Lastly, given the high
11 litigation costs, it is unlikely that other FIA consumers will file separate actions. *Cf.*,
12 *In re Bank One Securities Litigation/First Chicago Shareholders Claims*, 2002 WL
13 989454, *8 (N.D. Ill. 2002). As such, the Court finds that class litigation is superior
14 to individual actions.

15 CONCLUSION

16 For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part**
17 Plaintiff's motion for class certification. (ECF No. 39.) The following classes are
18 hereby certified pursuant to Fed. R. Civ. P. 23(a) and (b)(3) as to the causes of action
19 approved herein:
20

21 The Multi-State Class

22 All persons or entities, excluding defendants and their directors, officers,
23 predecessors, successors, affiliates, agents, co-conspirator and employees, as well as
24 the immediate family members of such persons, that, when a resident of either the state
25 of California, Florida, Illinois, Pennsylvania or Texas, purchased a Secure Index fixed
26 index annuity contract from ING USA Annuity and Life Insurance Company within the
27 applicable statute of limitations.

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The California Class

All persons or entities, excluding defendants and their directors, officers, predecessors, successors, affiliates, agents, co-conspirator and employees, as well as the immediate family members of such persons, that, when a resident of California, purchased a Secure Index fixed index annuity contract from ING USA Annuity and Life Insurance Company within the applicable statute of limitations.

The California Seniors Subclass

All members of the California Class that were age 65 or older on the date of purchase, excluding defendants and their directors, officers, predecessors, successors, affiliates, agents, co-conspirator and employees, as well as the immediate family members of such persons.

The Court designates Plaintiff Ernest O. Abbit as class representative and appoints the Hutton Law Group and Tatro & Zamoyski, LLP as class counsel. The Court directs the parties to confer and submit a joint proposed notice to the Classes on or before December 14, 2015.

To the extent that the Court relied upon evidence to which Plaintiff objected, the objections are overruled. (ECF No. 46.) The Court did not rely on any inadmissible evidence in reaching its decision. To the extent the Court did not rely on evidence to which the Plaintiff objected, the objections are overruled as moot.

IT IS SO ORDERED.

DATED: November 16, 2015


HON. GONZALO P. CURIEL
United States District Judge